No. 81734-1

SUPREME COURT OF THE STATE OF WASHINGTON

COLUMBIA PHYSICAL THERAPY, INC.,

Petitioner,

v.

BENTON FRANKLIN ORTHOPEDIC ASSOCIATES, ET AL.,

Respondents.

BRIEF OF RESPONDENTS IN ANSWER TO THE AMENDED AMICUS CURIAE BRIEF OF PHYSICAL THERAPY ASSOCIATION OF WASHINGTON, INC.

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Respondents Benton Franklin Orthopedic Associates, PLLC, Benton Franklin Physical Therapy, Inc., Thomas Burgdorff, Christopher Kontogianis, Arthur Thiel, David Fischer, Heather Phipps, Rodney Kump and Jay West (collectively, "Benton Franklin"), pursuant to RAP 10.3(f) and the Court's August 10, 2009 letter order, hereby answer the amended amicus curiae brief filed by Physical Therapy Association of Washington, Inc. ("PTAW") in support of Petitioner Columbia Physical Therapy, Inc. ("Columbia").[1]

ARGUMENT

In its motion for leave to file an amicus brief, PTAW asserted that although "counsel have briefed the court on issues specific to this case," "the Court would benefit from additional briefing on the global state-wide (and indeed, nation-wide) policy issues that lay at the heart of the statutes and law before this Court."[2] PTAW made this suggestion, but then in the brief it filed did not address policy issues with any specificity, support or citation. Patient care is never mentioned in PTAW's brief. The amicus brief does not discuss why a policy forbidding corporations entirely owned

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1 "Amicus Curiae Brief Submitted by Physical Therapy Association of Washington -- Amended," Sept. 17, 2009 (cited herein as "Amended Amicus").

2 PTAW's Motion for Permission to file Amicus Curiae Brief, July 9, 2009, at 8.

by physicians from employing physical therapists would be good for patient care, patient convenience, or patient treatment. The amicus brief does not even articulate a policy framework for why physician employment of physical therapists within the physician's medical practice would harm our health care system. The brief offers no data or specific information on how medicine or physical therapy is practiced in Washington now; why that mode of practice is good or bad; or why it should be changed. There simply is no discussion of reasons why petitioner Columbia's positions should be adopted as Washington or nation-wide policy.

Instead of a reasoned policy analysis or a discussion of specific facts about patient care or public health, PTAW offers only unsupported, conclusory statements that only physical therapists should be allowed to employ other physical therapists in Washington. Although we can understand why PTAW and at least some of its members (namely, Columbia) are financially incentivized to want to monopolize the business of physical therapy in the State, it does not follow that the Legislature has granted such a monopoly or that such a monopoly would be in the best interests of Washington's patients or the State's health care system.

A. PTAW's Legal Arguments Rest on a Misreading of the Professional Service Corporations Act.

PTAW spends nearly its entire amicus brief (pp. 1-16) repeating Columbia's arguments under the Professional Service Corporations Act ("PSCA"), in direct contravention of RAP 10.3(e) which states that "Amicus must review all briefs on file and avoid repetition of matters raised in other briefs." Like Columbia, PTAW builds its legal argument on a misreading of the plain words of the PSCA. At page 3 of its Amended Amicus, PTAW asserts that "[b]y the plain language of the statute, physical therapists are not included in the group of medical professionals allowed to own *or* offer services under a single corporate entity with orthopedics." (Amended Amicus at 3 (emphasis added)). Similarly, at page 7 of its Amended Amicus, PTAW states that the "PSCA does allow members of the 'same' profession to form a corporation and own stock in *or* render individual professional services within limited specialized corporations." (*Id.* at 7 (emphasis added)).

But RCW 18.100.050(5)(a) does not use the words "own *or* offer services," or "own stock in *or* render professional services." Rather, RCW 18.100.050(5)(a) identifies professionals who "may own stock in *and* render their individual professional services through one professional service corporation." Only by misreading the statute in the disjunctive, not the conjunctive, can PTAW assert that the statute is not directed at

ownership of professional service corporations, but rather at employment of professionals (the rendering of services). Once the legislature's actual choice of word – "and" – is restored to its place in the statute, PTAW's contention that the PSCA forbids employment of therapists by a physican-owned corporation fails.

Unlike PTAW's contentions about the PSCA, Benton Franklin's understanding of the Act is based on the statute's plain words. Nor does Benton Franklin's understanding render any of those plain words meaningless. RCW 18.100.050(5)(a) clearly provides that physicians and physical therapists cannot *co-own* a professional service corporation. That is the effect of placing these health care professionals in different subparagraphs of 18.100.050(5). There is no dispute that Benton Franklin is owned only by licensed medical doctors. (*See, e.g.,* CP 451-52, 526, 935, 945, 957). Critically, Benton Franklin is not arguing that the PSCA (or any other statute) should be interpreted to allow joint ownership of professional service corporations by physicians and physical therapists. The only issue here is whether physicians can employ physical therapists in physician-owned medical practices.

B. PTAW's Arguments Are Based Entirely On Conclusory Assertions.

PTAW's amended brief contains a section titled "Case law supports Columbia's argument," yet PTAW does not actually discuss any

cases in this section of its brief. (Amended Amicus at 15-16). In fact, PTAW discusses only one case in its amicus brief, this Court's decision rendered 66 years ago (long before the PSCA was adopted) in *Standard Optical v. Superior Court*, 17 Wn.2d 323, 135 P.2d 839 (1943). Columbia relied heavily on *Standard Optical* in its briefs to this Court, and PTAW does little more than recycle Columbia's argument.[3] Benton Franklin has already discussed (and will not repeat here) the ways in which *Standard Optical* is easily distinguishable from the instant action. *See* Benton Franklin Opening Br. at 37-38 & Benton Franklin Reply Br. at 18 (explaining that *Standard Optical* focused on unrelated issue of lay ownership of medical practices).

PTAW also argues at length about the legislative history of RCW 18.100.050. (Amended Amicus at 3-4, 12-15). PTAW's discussion of legislative history is flawed in at least two fundamental respects.

First, PTAW's discussion of legislative history is irrelevant if, as Benton Franklin contends, the words of the statute are clear on the face of the statute. If the language of a statute is plain and unambiguous, there is no need to consider legislative history.

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[3] Petitioner's Brief on Appeal, Jan. 30, 2009, at 15-18, 21; Petitioner's Response Brief, May 22, 2009, at 11-12.

Second, PTAW's brief contains no support whatsoever for its claims about the Washington Legislature's intentions, PTAW's supposed "major role" (*id.* at 12) "in carving out a niche for physical therapists in the highly competitive world of medical practice,"[4] or its supposed understanding of the Legislature's intentions. Instead, PTAW offers only unsupported assertions. *Nothing* is cited in support of these assertions – no legislative history, no publications, and certainly nothing in the record on appeal.

"The briefs of amicus curiae should conform to section (a)," and of course section 10.3(a) of the Rules on Appeal requires "citations to legal authority and references to relevant parts of the record." RAP 10.3(e), 10.3(a)(6). PTAW freely dispenses with this rule. PTAW claims that the separation of physical therapists from physicians "is the result of many a hard fought battle," asserts that the Legislature has determined that there is to be a complete separation of the two, and even contends that considering

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[4] *See* the original Amicus Brief filed by PTAW on September 14, 2009, at page 4. When PTAW filed its amended brief on September 17, 2009, this statement had been deleted. Perhaps PTAW realized that its original turn of phrase revealed its intentions too clearly; after all, PTAW does not explain (in either its original or amended amicus brief) why it is beneficial for anyone (other than self-employed physical therapists) to "carve out a niche for physical therapists in the highly competitive world of medical practice." Our law typically proceeds from the assumption that competition is healthy for our society, professionals, and the public – here, the patients.

physical therapy as "incident to" a physician's services reveals an improper objective and "bias." (Amended Amicus at 14, 4-5). But PTAW cites nothing for these propositions – which are far from evident in the statutory language – and does not even explain what the "hard fought battles" were. This omission may not be inadvertent. RCW 74.09.240(3), the Anti-Kickback Statute, incorporates the federal Stark Law's exceptions, which permit physician group practices to furnish their patients with physical therapy as "in-office ancillary services." *See* 42 C.F.R. § 411.355(b).

Similarly, PTAW asserts, without citation, that the "Legislature repeatedly declined to add physical therapists to the list" of professions in 18.100.050(5)(a) – without a single citation to anything to suggest that such an attempt was made, or to permit Benton Franklin to answer this allegation. (Amended Amicus at 12-13). In response to this Court's teaching that "nonpassage says nothing about the Legislature's intent with respect to the subject matter of the bill,"[5] PTAW contends "that does not mean that in *this* case the legislative history cited does not provide an informative window into the result of concerted efforts of physical therapists in maintaining an autonomous role in the practice of medicine."

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[5] *Danny v. Laidlaw Transit Servs., Inc.*, 193 P.3d 128, 134 n.3, 165 Wn.2d. 200, 213 n.3 (Wash. 2008), *citing Red Lion Broad. Co. v. Federal Communications Comm'n,* 395 U.S. 367, 381 n.11 (1969).

(Amended Amicus at 14). But PTAW does not explain why this case should be different, what those "concerted efforts" were, how these efforts impacted the legislature, why physical therapists should have an "autonomous role in the practice of medicine" when no other medically-related specialties do, or even why an "autonomous role in the practice of medicine" for physical therapy should prevent some physical therapists from choosing to work for doctors. PTAW's failure to explain why physical therapists should not be able to work with orthopedic physicians is particularly notable given that the Legislature provided, in RCW 18.74.140, that "[n]othing in this chapter restricts the ability of physical therapists to work in the practice setting of their choice."

C. PTAW Seeks a Monopoly of Physical Therapy Services.

PTAW asserts that "the trial testimony discussed by the parties makes it clear that Benton has every intention of continuing to expand its physical therapy arm," and the "only apparent reason that Benton physical therapists do not serve the vast majority of Benton's referrals is a simple lack of capacity." (Amended Amicus at 16). There is no citation to the record on appeal for these propositions. What the record on appeal shows is that Benton Franklin gives each and every patient the choice of which physical therapist they want to see, including petitioner Columbia. (*See, e.g.*, CP 313, 336, 943, 959-60, 1335, 1340). Indeed, the testimony of

Columbia's expert witness, C. Frederick DeKay, demonstrates that only about 30 percent of BFOA's patients who needed physical therapy in the years 2003 through 2006 went to BFOA's physical therapists for their treatment. (CP 469, table 2). There is nothing in the record to suggest that the reason for such a low internal referral rate is Benton Franklin's inability to hire additional therapists.

PTAW's claim that Benton Franklin is seeking to "severely restrict trade in physical therapy services, by channeling orthopedic referrals in an area into the physical therapists working under the orthopedic [sic]" (*id.* at 18), is thus refuted by the record on appeal and by Columbia's own expert witness. PTAW's flawed factual contentions also are improper in an amicus brief. The "purpose of an amicus brief is to help the court with points of law and not to reargue the facts." *Pleas v. City of Seattle*, 49 Wash App. 825, 827 n.1, 746 P.2d 823, 827 n.1, *rev'd on other grounds*, 112 Wn.2d 794, 774 P.2d 1158 (1989). PTAW's suggestion that doctors are trying to monopolize the physical therapy business also is contradicted by PTAW's own brief, which asserts that physical therapists "perform a great percentage of their services without the supervision of or referral by a physician." (*Id.* at 2).

There is nothing in the record on appeal to suggest that Benton Franklin or any other group of doctors is attempting to monopolize the

delivery of physical therapy in Washington. There is plenty of reason to believe, however, that PTAW's surrogate, Columbia, filed this test case with its own agenda of monopoly in mind. After all, every page of PTAW's brief contends that physical therapists alone should be allowed to employ other physical therapists. None of the statutes or common law doctrines of this state supports such a result, however, and PTAW's brief does not direct the Court to any such authority nor does the brief offer the Court a coherent rationale for why such a regime would ever make sense.

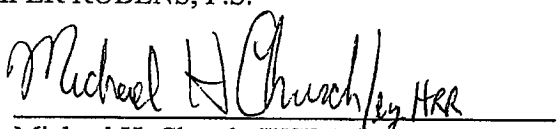
CONCLUSION

PTAW has submitted an amicus brief that demonstrates that PTAW is a friend of petitioner Columbia, but not a friend of the Court. PTAW's brief does little more than tell the Court that PTAW agrees with the petitioner but offers nothing but conclusory assertions in support. Nothing tangible is said in PTAW's amicus brief that could affect the Court's determination in this case. Therefore, for all the reasons set forth in Benton Franklin's opening brief, reply brief and above, Benton Franklin respectfully requests this Court to (1) reverse the trial court's denial of summary judgment for Benton Franklin on Columbia's claims under the Anti-Rebate Statute and the Consumer Protection Act, (2) remand this case to the trial court for entry of summary judgment in favor of Benton Franklin on Columbia's claims based on the Anti-Rebate Statute, the

Consumer Protection Act and the common law corporate practice of medicine doctrine, and (3) affirm the trial court's grant of summary judgment in favor of Benton Franklin on Columbia's PSCA claim.

Respectfully submitted this 13th day of October, 2009

STAMPER RUBENS, P.S.

By: 

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Certificate Of Service

The undersigned certifies, under penalty of perjury under the laws of the United States and the State of Washington, that on this date he caused to be served a copy of the foregoing Brief of Respondents in Answer to the Amended Amicus Curiae Brief of Physical Therapy Association of Washington, Inc., by e-mail and by Federal Express, overnight delivery, on the following counsel:

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Document attached for filing: Brief of Respondents in Answer to the Amended Amicus Curiae Brief of Physical Therapy Association of Washington, Inc.

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